

**OPINION
62-232**

March 7, 1962 (OPINION)

TAXATION

RE: Assessment - Nurseries

This is in regard to your letter of January 26, 1962, requesting an opinion as to whether a nursery, together with buildings and machinery, should be assessed as an agricultural or a commercial operation.

You stated that the owner of this nursery grows trees and other nursery stock from seeds and the stock, when ready for sale, is sold by the owner. The nursery in question is located approximately three miles outside the city limits of Bismarck, North Dakota.

While nurseries and nursery operators are required to be licensed by your office pursuant to chapter 4-20 N.D.C.C., there seems to be no relation between that requirement and the property tax problems involved.

In determining the method of taxation of the above nursery operation, it becomes necessary to ascertain whether the trees and other nursery stock constitute crops growing upon cultivated lands, and whether the buildings and improvements used in connection with the nursery operation are farm structures and improvements within the meaning of subsection 15 of section 57-02-08 N.D.C.C.

Subsection 1 of section 57-02-03 N.D.C.C. provides that all real and personal property in this this state is subject to taxation unless otherwise expressly provided. Section 57-02-04 excludes trees from the definition of real property for taxation purposes.

Section 57-02-27 N.D.C.C. is quoted in part as follows:

In assessing any tract, or lot of real property, there shall be determined the value of the land, exclusive of improvements, and the value of all taxable improvements and structures thereon, and the aggregate value of the property, including all taxable structures and other improvements, excluding the value of crops growing upon cultivated land."

Section 57-02-08 which sets out various exemptions from property taxes includes the exemption for farm improvements in subsection 15, quoted as follows:

All farm structures, and improvements located on agricultural lands. This subsection shall be construed to exempt farm buildings and improvements only, and shall not be construed to exempt from taxation industrial plants, or

structures of any kind not used or intended for use as a part of a farm plant, or as a farm residence."

I have been unable to find any North Dakota decisions regarding the taxability of nurseries. However, in *Muthke, et al v. Pierce County*, 23 P.2d. 405, the Washington Supreme Court in construing a statute identical to section 57-02-27, as quoted above, held that growing nursery stock, consisting of deciduous and evergreen trees, taking several years to become marketable, was property assessed and taxed as merchandise stock and was not within the statutory exemption excluding crops growing on cultivated lands from assessment.

In *Story v. Christin, et. al*, 95 P.2d. 925, the Supreme Court of California held that nursery stock, such as trees attached to soil by roots in order to keep them ready for sale, does not constitute a "crop" within the legal meaning of that term. The court said "on the other hand, such trees seem to have all the characteristics of stock in trade, which is a stock of merchandise as that term is ordinarily used among businessmen."

See also *Jackson and Perkins Co. v. Stanislaus County Board of Supervisors*, 335 P.2d. 976, in which the California Court held that a company engaged in the nursery business should be assessed for its rose plants as a stock in trade and that such plants were not "growing crops" within the meaning of constitutional and statutory provisions providing that "growing crops" should not be assessed.

In addition to the above the following authorities are cited for the proposition that trees are not "growing crops," crops or farm products. *Cottle v. Spitzer*, 4 P. 435; *Kirby Lumber Corporation v. Hardin Independent School District*, 351 S.W.2d. 310, and *Kennedy v. Spalding*, 53 P.2d. 804.

In *Heller, et al v. Amewalk Nursery*, 2 N.Y.S. 2d. 196, the Supreme Court of New York in determining whether nursery trees were crops within the meaning of a statute entitling a mortgagor to remove a crop at any time prior to a foreclosure sale, held that the nursery trees did not constitute a crop. The court said, "Distinctions suggest themselves, however, between growing crops and trees cultivated in a nursery. The encouragement of agriculture, in which the rule with respect to emblements is said to have originated, has little relationship to the cultivation of nursery trees, which is more of an industrial than an agricultural pursuit."

It is a well-established rule that tax exemption statutes are to be strictly construed, the burden being on the claimant of a tax exemption to establish the exempt status of his property. See *North Dakota Society for Crippled Children and Adults v. Murphy*, 94 N.W.2d. 343, 345. It should also be noted that in *Eisenzimmer v. Bell*, 75 N.D. 732, 32 N.W.2d. 891, the court, in holding that farm buildings located on a platted lot of city were not located on agricultural land and therefore were not exempt under subsection 15 of section 57-02-08, said regarding this subsection:

It was the intention of the legislature to encourage the construction of buildings and improvements on farms and to that end classified this particular type of property as exempt from taxation."

Considering the above authorities and the fact that section 57-02-04 excludes trees from the definition of real property for taxation purposes and that consequently the nursery trees could not be exempt as farm improvements under 57-02-08(15) because this subsection applies only to real property, I conclude that the trees and other nursery stock do not constitute growing crops within the meaning of section 57-02-27 and that the trees and other nursery stock should be assessed as a stock of merchandise pursuant to section 57-02-11(2). It is also my conclusion, considering the rule of strict construction of tax exemption statutes and in view of the fact that a nursery operation has been regarded as more of an industrial pursuit than an agricultural pursuit in the only case found which considered the question, that the buildings used in connection with the nursery are not exempt under 57-02-08(15). The machinery, such as tractors, plows and cultivators used in this operation, would be assessable as personal property pursuant to section 57-02-11(2) regardless of whether or not any of the above conclusions were different.